

the liability resting upon the railway company is to be regarded as statutory so far as imposed by the by-law No. 624, which might be regarded as incorporated in the statute of 29th March, 1873, under which the Hamilton Street Railway Co. constructed their lines, and in that light regarding the provisions of by-law 624 as conditions upon which the Legislature authorized the construction of these lines, and as therefore imposing upon the Hamilton Street Railway Company the duties which the by-law calls upon them to perform, I would read this by-law as not imposing any duty to construct or repair the highway or the portion of the highway which was placed in their hands for construction and repair by the by-law, except upon the requirement of the board of works in and for the city, as stated in sec. 5 of the by-law.

Section 5 reads: "The space between the rails to be allowed for the railway upon any paved or macadamized street and for two feet outside of such rails shall be, by the said company, and under the direction of and as required by the board of works in and for the said city, constructed and kept in repair with such suitable material as the said board of works may from time to time direct, the materials therefor to be supplied by or at the expense of the said city corporation."

I cannot read this provision of the by-law as requiring the company to either construct or repair without a demand or request from the board of works. In that view of the matter, there is an entire absence of evidence that there was ever any such requirement or request. It is in evidence that the roadway was originally properly constructed; it is in evidence that the rails are laid flush as nearly as practicable with the surface of the street; the evidence satisfied me that the depression which caused this accident was the result of wear upon the portion of the highway between the tracks. If the board of works of the city had required the company to repair this, and requested them to do it, and the company had neglected such duty, it might be that in the view suggested, regarding this by-law as in effect a statutory condition imposing a statutory duty upon defendants, plaintiffs would have some remedy, but, as I construe the by-law, the only duty which it imposes upon the railway company arises after and upon request of the city made through the board of works. In the absence of such request, I cannot find that there was any such duty upon that ground. Therefore, the action fails, and must be dismissed with costs.